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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL ADAMS,

Defendant and Appellant.

B198508

(Los Angeles County
Super. Ct. No. LA053553)

APPEAL from a judgment of the Superior Court of Los Angeles County,
John S. Fisher, Judge. Modified and, as modified, affirmed.

Gene D. Vorobyov, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kristofer Jorstad
and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Paul Adams appeals the judgment entered following his conviction by jury of first degree burglary. (Pen. Code, § 459.)¹ The jury found Adams had a prior serious felony conviction within the meaning of the “Three Strikes” law (§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and section 667, subdivision (a)(1) and that he had served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced Adams to a term of 17 years in state prison.

Adams contends defense counsel rendered ineffective assistance, the trial court improperly stayed a prior prison term enhancement and a \$20 DNA assessment must be set aside. We agree the \$20 DNA assessment must be stricken but otherwise affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

1. Preliminary hearing.

Adams was charged with residential burglary of a home in the 1110 block of Kitteredge Street that occurred in December of 2004 based on a “cold hit” match of his fingerprint to fingerprints lifted from the crime scene.

At the preliminary hearing, a Los Angeles Police Officer testified that on December 12, 2004, he took a burglary report from the resident of the home. The resident stated that at 8:00 a.m., she locked the home and left. She returned at 3:30 p.m. to find property was missing and the screen had been removed from the bathroom window. She found the screen outside the home propped against the wall.

Forensic fingerprint expert Peggy Fiderio testified she lifted latent fingerprints from the screen frame, a ceramic dish and the window sill of the bathroom window. Fiderio rolled Adams’s fingerprints on the morning of her testimony and was able to match the fingerprint lifted from the screen to Adams. Fiderio indicated she lacked the proper lighting tools to compare Adams’s fingerprints to the other two latent prints. Fiderio indicated the other two lifts would have to be compared to the exemplar at her office.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

2. Pre-trial proceedings.

Immediately prior to the commencement of jury trial, outside the presence of the jury, defense counsel indicated Fiderio had informed the prosecutor that a fingerprint that could not be identified at the preliminary hearing had now been identified as Adams's fingerprint. Defense counsel indicated he had been caught off guard and the defense trial strategy had been affected.

The prosecutor responded that, at the preliminary hearing, Adams was reluctant to be fingerprinted and had to be ordered by the magistrate to submit to fingerprinting. Fiderio indicated Adams's hands were sweaty and the exemplar she obtained was not very good. At the preliminary hearing, Fiderio testified she did not have the proper lighting to make a comparison of two of the latent prints from the crime scene.

The prosecutor indicated that, based on a fingerprint exemplar obtained from Adams that morning, Fiderio had been able to verify that another print found inside the Kitteredge Street residence matched Adams. Additionally, using the lighting equipment at her office, Fiderio had determined that the sweaty prints provided by Adams at the preliminary hearing matched the latent print found inside the home.

After the trial court conferred with defense counsel out of the presence of the prosecutor, the trial court indicated it intended to exclude evidence of the most recent fingerprint comparison.² The trial court ruled it was unfair to provide discovery of this significant evidence without any explanation for the delay. The trial court noted a continuance to allow the defense to investigate the evidence would not be fair because Adams was in custody.

However, the trial court ruled the People could present evidence indicating Adams's fingerprints had been found inside a residence in Glendale that was burglarized in April of 2005.

² Defense counsel and the trial court conferred outside the presence of the prosecutor. The trial court indicated the transcript of this conference would be sealed. However, a reporter's transcript of this conference is included in the record on appeal.

At the outset of trial, the prosecutor indicated Fiderio had been warned not to testify about any comparison other than the one she made at the preliminary hearing. The prosecutor asked that defense counsel not be allowed to inquire about the presence of other fingerprints. The trial court agreed and warned defense counsel to “tread carefully on that [subject] because if you open the door to other prints” the trial court would not hesitate to admit the evidence. Defense counsel responded he would pretend the fingerprints did not exist.

3. *Trial evidence.*

a. *Kitteredge Street burglary.*

On December 12, 2004, the resident of a single family residence on Kitteredge Street came home to find her home had been ransacked and personal property was missing. The bathroom window had been pulled off the hinges and the screen was on the ground outside the window. Earlier that day, the bathroom window screen was in place and the window was not broken.

On cross-examination, defense counsel elicited that, some time more than four years ago when the resident moved into the home, it had shared a basketball court with a neighbor. However, there was no common area with a neighbor at the time of this incident.

Fiderio testified she lifted a fingerprint from a window screen that was leaning against the wall outside the home. Months later, she received notification of a computer match on the fingerprints and was subpoenaed to court in November of 2006. When she arrived at Adams’s preliminary hearing, she attempted to obtain Adams’s fingerprints. Adams initially was reluctant to provide fingerprints. Fiderio was directed to wait in the hallway while the magistrate addressed whether to order Adams to provide fingerprints. Fiderio thereafter was able to obtain Adams’s fingerprints. However, Adams hands were sweaty and she obtained poor quality fingerprints. Fiderio testified that, in her opinion, the fingerprint of Adams’s little finger on his left hand was on the window screen.

b. *The Glendale burglary.*

On April 11, 2005, a Glendale residence was burglarized. The screen was removed from the bathroom window and the window was “totally opened.” A jewelry box was missing and the closet was disturbed.

Mary Ellen Gorski, a forensic specialist with the Glendale Police Department, testified that on April 12, 2005, a now retired forensic specialist obtained a latent fingerprint from the top of the glass shower door in the bathroom of the residence. Gorski testified the fingerprint lifted from the crime scene was made by Adams’s left thumb.³

c. *Argument to the jury.*

Defense counsel argued the People’s presentation of evidence of an uncharged burglary amounted to an admission the Kitteredge Street case was weak. Defense counsel suggested the Glendale burglary would be resolved in another criminal proceeding and the evidence had been presented here only to prejudice the jury against Adams. Defense counsel argued there was no way to determine the age of the fingerprint found on the window screen and there was evidence there had been a basketball court in a common backyard. Defense counsel suggested there was no way to determine whether Adams ever entered the house. Defense counsel argued, “When you look at the state of the case on Kittredge Street, you don’t see prints inside the home. You don’t – ”

The prosecutor objected and requested a sidebar conference. Defense counsel indicated he was entitled to argue “whatever the evidence has shown and not shown.” Defense counsel indicated the subject of the fingerprints inside the Kitteredge Street home had not been raised in testimony and defense counsel’s comment in closing argument was appropriate given the state of the evidence.

³ On the morning of her trial testimony, Gorski was able to obtain fingerprints from Adams’s right hand but he would not allow her to fingerprint his left hand. Gorski nonetheless was able to compare the right hand fingerprints to a previous 10 print card to determine, based on Adams right hand fingerprints, that his left thumb made the lifted fingerprint.

The trial court responded defense counsel's conduct was outrageous and reminded defense counsel it previously had warned the defense not to mention the excluded fingerprint evidence. The trial court noted defense counsel now was suggesting there were no fingerprints found inside the house when there were. Defense counsel asserted: "This is closing argument, and I believe that my - - my commenting that no prints were produced inside the house" was appropriate. "[T]he evidence is closed so I believe it's fair game, and I don't believe it's outrageous."

The prosecutor requested leave to reopen the case indicating the jury would assume defense counsel has seen the entire case and therefore would naturally believe there were no other fingerprints.

After a recess, defense counsel indicated he had discussed the matter with colleagues and had been advised that he had made a mistake. Defense counsel apologized but claimed a curative admonition would be sufficient to cure any prejudice.

The trial court ruled the prosecutor would be permitted to reopen the case.

d. *The case is reopened.*

The trial court explained it to the jury, "we're interrupting the argument. For legal reasons of no concern to the jury, I have made a decision to allow the lawyers to reopen the evidence in the case,"

The prosecutor recalled Fiderio who testified Adams's left-hand palm print was found on the inside window sill of the bathroom window of the Kitteredge Street home. The orientation of the palm print suggested it was made as Adams climbed into the house through the window.

e. *Argument resumed.*

The prosecutor indicated the People's arguments remained the same except for the addition of "concrete, undisputed" evidence that Adams not only left a fingerprint on the outside window frame but also left a palm print on the inside window sill.

Defense counsel responded, "I don't think anything's changed here." Defense counsel asserted the jury could see for itself the latent print did not match Adams's fingerprint. Defense counsel suggested that, at the time Fiderio examined the new fingerprints, she already had it in mind that Adams's fingerprint would be found and this detracted from her objectivity. Additionally, Adams's palm print had not been subjected to computer evaluation and there was no evidence as to when the palm print had been placed on the window sill. Defense counsel concluded the jury reasonably could conclude the palm print belonged to someone other than Adams.

f. *Verdicts and findings.*

The jury convicted Adams of burglary and found prior conviction and prior prison term allegations true.

The trial court sentenced Adams to state prison for the high term of six years for burglary, doubled on account of the prior strike conviction and added five years under section 667, subdivision (a). The prosecutor asked the trial court to strike the one-year prior prison term enhancement on the ground it had been the basis for imposing the upper term. Thus, imposition of the enhancement would constitute an improper dual use. The trial court stayed the enhancement pursuant to section 654. In addition to other fines and penalties, the trial court imposed a "\$20 DNA fee."

CONTENTIONS

Adams contends defense counsel rendered ineffective assistance, the trial court improperly stayed the prior prison term enhancement and the \$20 DNA assessment must be set aside.

DISCUSSION

1. *Adams fails to demonstrate ineffective assistance of counsel.*

a. *Relevant legal principles.*

In order to prevail on a claim of ineffective assistance of counsel, an appellant “must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.] Tactical errors are generally not deemed reversible, and counsel’s decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . .’ [Citation.] Finally, prejudice must be affirmatively proved; the record must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 333; *Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

b. *Adams’s arguments.*

Adams contends defense counsel’s improper argument enabled the prosecution to introduce previously excluded and highly probative evidence that Adams’s left palm print was found inside the home, thereby destroying Adams’s argument he did not actually enter the home. Adams notes an attorney has a duty not to mislead the jury by making a false statement of fact (State Bar Rules of Prof. Conduct, rule 5-210(B)) and that similar conduct by a prosecutor is misconduct (*People v. Varona* (1983) 143 Cal.App.3d 566, 570; *People v. Daggett* (1990) 225 Cal.App.3d 751, 758). Adams reasons defense counsel had no right to ask the jury to infer no fingerprints were found inside the home when defense counsel knew that inference to be false.

Adams argues the error was prejudicial in that admission of the palm print evidence precluded a lack of entry defense. Defense counsel's actions also suggested the defense had been caught trying to hide incriminating evidence, thereby causing the defense to lose credibility in the eyes of the jury. Adams notes defense counsel was given an opportunity to explain the error and stated for the record his reason for the objectionable argument. However, no reasonable defense attorney would have made this type of closing argument under the facts of this case. (*People v. Diaz* (1992) 3 Cal.4th 495, 558.)

Adams argues this assessment is not undermined by the presence of his fingerprints inside the Glendale burglary scene or Fiderio's testimony that Adams was reluctant to provide a fingerprint sample. Adams asserts the evidence showed he was reluctant to submit to fingerprinting based on his mistaken belief he had a right to have an attorney present. After the error of this belief was explained to Adams, he cooperated with Fiderio. Admission of the palm print left defense counsel to argue the jury should ignore the expert's testimony and perform the fingerprint comparison themselves.

Adams concludes defense counsel's deficient performance requires reversal.

c. Resolution.

The record supports Adams's assertion that defense counsel engaged in improper argument. However, Adams must also demonstrate prejudice. Based on the compelling evidence of guilt apart from the palm print, it is not reasonably probable Adams would have received a more favorable outcome had the evidence been excluded. Adams's fingerprint was found on the screen of a bathroom window that was forcibly opened on the day of the burglary. Any innocent intent was refuted by the evidence indicating Adams's fingerprint was found on the Glendale shower door after that home was burglarized through the bathroom window five months later.

The trial court did not suggest defense counsel had committed misconduct and told the jury the case was being reopened for legal reasons that were of no concern to the jury. Further, when closing argument resumed, defense counsel argued the palm print did not match Adams's exemplar.

In sum, Adams fails to demonstrate “ ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different’ ” (*People v. Bolin, supra*, 18 Cal.4th at p. 333; *People v. Ledesma, supra*, 43 Cal.3d at pp. 216-218.)

2. *The trial court properly stayed the prior prison term enhancement.*

Adams contends the trial court should have stricken, rather than stayed, a prior prison term enhancement. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 368-369; *People v. Jones* (1992) 8 Cal.App.4th 756, 758.)

Adams’s argument overlooks that the trial court relied upon the prior prison term to impose the upper base term. It was therefore proper to stay, rather than strike, the enhancement. The cases cited by Adams involve discretionary decisions by the trial court not to impose an enhancement. In that circumstance, the enhancement must be stricken or imposed. Here, the trial court employed the prior prison term to impose the upper base term of imprisonment. Thus, it properly was stayed rather than stricken.

3. *The \$20 DNA penalty assessment must be stricken.*

Adams contends the \$20 DNA penalty assessment imposed by the trial court must be stricken. The People concede the point. It appears this concession is well taken. Due to recent statutory amendments, the DNA penalty assessment no longer applies to restitution fines. (Gov. Code, § 76104.6, subd. (a)(3).) The defendant generally is entitled to benefit from amendments that become effective while his case is on appeal. (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306.) Accordingly, we will order the abstract of judgment modified to delete reference to the DNA penalty assessment.

Preparation of an amended abstract of judgment is unnecessary in that the DNA penalty assessment is not reflected in the current abstract of judgment.

DISPOSITION

The judgment is ordered modified to delete reference to the \$20 DNA penalty assessment. As so modified, the judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.